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No. 94-1611

JUN 14 1995
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In The

Supreme Court Of The United States

October Term, 1994

Haitian Refugee Center, Inc., et al.,

Petitioners,

vs.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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18 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTORY STATEMENT	1
FURTHER STATEMENT OF THE FACTS	1
ARGUMENT	4
CONCLUSION	9

TABLE OF AUTHORITIES

CASES **Page**

Huerta v. United States, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977) 8, 9

Jean v. Nelson, 472 U.S. 846 (1984) 4, 5, 6

Jimenez v. The Tuna Vessel "Granada," 652 F.2d 415 (5th Cir. 1981) 7

Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977) . . . 7

United States v. Lee, 906 F.2d 117 (4th Cir. 1990) 8

United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975) 8

United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) 8

STATUTES

8 U.S.C. § 1182(d)(5)(A) 4, 5

INTRODUCTORY STATEMENT

Petitioners submit this reply brief pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States to address certain arguments raised by Respondents in their brief in opposition to the petition for a writ of certiorari.

FURTHER STATEMENT OF THE FACTS

Nothing in the Government's Opposition Brief changes the fact that the Haitian minors held at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"), have been detained for nearly a year, and continue to be detained, under arduous conditions that the Government has officially admitted to constitute an "extraordinary hardship." Petition Appendix ("Pet'n App.") at 39a. This hardship was the Government's stated basis for its decision months ago to grant, as it did, a group parole to all of the unaccompanied Cuban children at Guantanamo. *Id.* Those same camps, though, that were too harsh for the white Cuban minors were apparently considered acceptable for the black Haitian children.[1] The arguments that the Government later put forth to justify its discriminatory decision to parole the

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[1] Because the Haitian children who are the subject of this petition continue to be held under these conditions of "extraordinary hardship," the urgency of their needs means that Petitioners must oppose the request for delay of these proceedings sought by the Cuban American Bar Association ("CABA"), the plaintiffs below, in the "Respondents" brief that it recently filed with this Court. CABA, representing the interests of Cuban refugees held on Guantanamo, argued therein that the commonality between the issues raised by Petitioners and those that will be raised by CABA made it appropriate for this Court to defer ruling on the instant petition until CABA's is filed. As CABA itself points out, however, there remains very little common interest between Petitioners and CABA, because the Government has already granted a group parole to the unaccompanied Cuban minors, Petition ("Pet'n") at 5, and has now shifted its policy once again and granted a blanket parole to all of the approximately 20,000 Cuban refugees currently on Guantanamo. *See* Brief of Respondents CABA, Appendix ("CABA App.") at 15a. By contrast, the Haitian children have never been granted any such blanket relief. There is therefore no reason to delay these proceedings pending CABA's submission.

Cuban minors but not the Haitian children, based upon the purported political differences between Cuba and Haiti, have merely been a *post hoc* litigation strategy.[2] They were never mentioned at the time of the parole of the Cuban minors.

Now, relying upon factual material that is not in the record, the Government in its Opposition Brief has shifted its litigation position once again, arguing that it has purportedly begun a case-by-case processing program by which it will review the immigration status of each unaccompanied Haitian child, "based on a judgment of what is in the best interest of each child." Opposition Brief ("Opp.") at 3. Even if it is assumed, *arguendo*, that this program is carried out sincerely and effectively, it still falls far short of the group parole that was granted to the Cuban minors, and so it fails to cure the Government's discriminatory treatment of the Haitian children.

Since it is not in the record, the Government's information regarding this putative processing program should properly be stricken from the Opposition Brief, but, if this Court decides that it wishes to take this material into consideration, then it should be made aware of all of the facts surrounding it, and not simply those that the Government chooses to reveal. For instance, the Government's Brief does not reveal that there have been reports in reputable media sources that the Government's purported efforts thus far to place those unaccompanied Haitian children who have been involuntarily repatriated from Guantanamo in stable families has been failing badly, leaving the children to fend for themselves in the slums and on the streets of Haiti. Reply Brief of Petitioners, Appendix ("Reply App.") at 2a.

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[2] Moreover, the Government's recent shift in immigration policy toward Cuba eviscerates the rationale that political differences between Cuba and Haiti justified the harsher treatment of Haitian refugees. As part of this argument, the Government had contended that it could not repatriate Cuban refugees to Cuba, because of the political repression and potential for physical harm faced by refugees returned to Cuba. *See, e.g.*, Opp. at 6. According to the Government's newest policy, however, all new Cuban refugees attempting to reach Guantanamo henceforward will be returned to Cuba, regardless of any potential consequences. *See* CABA App. at 15a. This reversal of policy thus exposes the Government's earlier concern for the political environment in Cuba as a sham.

Other reports have indicated that some Haitian children have been placed with complete strangers in Haiti. Reply App. at 4a. Finally, those sources have disclosed instances where Haitian children were forced back to Haiti despite having identified relatives living in the United States. Reply App. at 1a.

Also, the Government neglects to mention in the context of its processing program that the Haitian children at issue have now been held in detention at Guantanamo for almost a year. Despite having had all of that time to attend to the needs of the Haitian children, the Government admitted that it was only in late May 1995, after Petitioner Haitian Refugee Center ("HRC") had filed its Petition, that it reached what it called "an acceptable resolution" designed to "address this problem." CABA App. at 19a. Following, as it does, this long period of neglect, the fact that the Government has only now roused itself to demonstrate solicitude for "the best interests of each child" calls the genuineness of its concern into question. Certainly, the Government has never shown the same concern for the Haitian children's well-being as it has for that of the Cuban children.

Moreover, the Government's claim that it is "tracing and interviewing family members and conducting home visits," CABA App. at 19a, on behalf of the Haitian children rings especially hollow. The most extensive source of family contacts for the Haitian children, the most effective mediator for interviews and home visits, and the most useful counselor for the Haitian children as they undergo this case-by-case review, is HRC, *see* Pet'n App. at 38a, yet the Government has never once consulted it. Indeed, the Government even continues to refuse to provide HRC with a list of the names of the Haitian children held at Guantanamo, even though such a list would enormously speed the process of tracing family members. Instead, as described in the Petition and *infra*, the Government has systematically refused to allow HRC access to the Haitian children, even though all that HRC has sought to do is to provide just the sort of services to the Haitian children that the Government has now admitted are "in the best interests of each child." CABA App. at 19a. This insincere, ineffective, eleventh-hour "solution" that

the Government has put forth from outside the record in this case is no solution at all. It contemplates forcing the Haitian children out of their harsh detention at Guantanamo into an even more inhumane and dangerous future on the largely lawless streets of Haiti, and it should not be countenanced by this Court.

ARGUMENT

Try as it might, the Government's Brief cannot overcome the fact that the decision of the panel below squarely conflicts with the explicit holding of this Court in *Jean v. Nelson*, 472 U.S. 846 (1984). The Court in *Jean* expressly held that 8 U.S.C. § 1182(d)(5)(A), the same statute that is at issue in the instant case, limited the otherwise broad discretion of the Attorney General's parole powers, by forbidding her from making parole decisions based on the race or national origin of the aliens at issue; specifically, it stated with regard to § 1182(d)(5)(A) that "the current *statutes* and regulations provide petitioners with non-discriminatory parole consideration." *Id.* at 854-55 (emphasis added). This Court then remanded the matter for a determination whether "INS officials exercised this broad discretion under the *statutes* and regulations without regard to race and national origin." *Id.* at 857 (emphasis added). In spite of this binding precedent, the panel below reached the opposite conclusion, holding that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." Pet'n App. at 22a. To reach this erroneous conclusion that it was permissible for the Government in this case to detain the Haitian children under harsh living conditions at Guantanamo, while at the same time offering parole *en masse* to the similarly-situated Cuban children, the panel below relied upon the lower-court opinion in *Jean*, *id.*, which was rendered bad law after this Court in *Jean* affirmed only the lower court's judgment and disavowed its reasoning. The panel did not acknowledge even in passing the controlling, contrary language in this Court's opinion in *Jean*. *See id.*

In its Brief, the Government does not (because it cannot) resolve the stark conflict between the lower court's holding and

this Court's decision in *Jean*. Instead, the Government offers only the empty contention that this Court, in deciding *Jean*, did not mean what it said. Despite the fact that this Court in *Jean* repeatedly stated that it was interpreting the "statutes and regulations" governing the Attorney General's parole discretion, the Government argues that *Jean* addressed a "regulatory practice" and did not construe the governing statute. Opp. at 10. This argument, however, openly contradicts the language of this Court's opinion in *Jean*, as quoted above, and, indeed, the Government offers no support for it apart from a vague reference to certain items from the legislative history of § 1182(d)(5)(A). *Id.* This legislative history, of course, carries no authority now that the statute has already been expressly construed by this Court. Finally, the Government's own Brief appears to concede that *Jean* extended to the Government's statutory authority, and not just its "regulatory practice." That Brief notes that "[t]he government repeatedly stated [in *Jean*] that both Congress and the Executive could make nationality-based distinctions by *statute* or regulation." Opp. at 11 n.5 (emphasis added). There would be no need for the Government to have made such arguments concerning its statutory authority unless it were the statute at issue before this Court.

Indeed, as it must, the Government does concede that *Jean* construed "the restrictions placed on INS by the 'statute' and regulations." Opp. at 11 n.5. Having acknowledged this point, however, the Government proceeds to ignore it. After digressing irrelevantly on the Government's litigation posture in *Jean*,[3] its Brief then states that "[n]or was this Court's disposition of *Jean* in any way dependent upon a conclusion that the Executive Branch was barred by statute from considering nationality in its

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[3] As noted in the Petition, the Government conceded at oral argument in *Jean* that it was barred from exercising its parole discretion on the basis of race or national origin. Pet'n at 14-15. In its Brief, it attempts to minimize this concession by arguing that it referred only to the applicable regulations and not to the governing statutory authority. Opp. at 11 n.5. However, as described *supra*, this Court's reference in *Jean* to the "statutes and regulations," *Jean*, 472 U.S. at 854-55, 857, make clear that it was understood at that time by all parties that this Court was reviewing the scope of the statute, not just the implementing regulations.

parole decisions." *Id.* In light of the fact that this Court explicitly remanded *Jean* with the instruction that the exercise of statutory discretion on the basis of race or nationality was impermissible, *Jean*, 472 U.S. at 857, the Government's statement is breathtaking in its inaccuracy.

Despite the Government's efforts to render it murky, this Court's holding in *Jean* is unequivocal and inescapably in conflict with the opinion of the panel below. This Court should not permit its binding precedential authority to be disregarded in this manner. It should grant certiorari in this case and reverse the decision of the panel below.

The other arguments raised by Petitioners as grounds for certiorari also remain unrefuted by the Government. Indeed, with regard to the Petitioners' claim of impermissible viewpoint discrimination in violation of the First Amendment, the Government's Opposition Brief all but concedes that such discrimination has been and is continuing to be practiced. The Government admits that it has afforded broad access to the Haitian refugees to those groups that "assist the government." Opp. at 20. In other words, the only groups that can have "one-on-one access" to the Haitian children and can "maintain a long-term presence on Guantanamo," *id.*, are those that disseminate a message that the Government has deemed acceptable.

Petitioner HRC, however, whose message is not approved by the Government, is barred from meaningful access.[4] The extensive network of support services that HRC can provide to the Haitian children detained at Guantanamo is precisely the sort of assistance that the Government purports to be seeking as it supposedly conducts case-by-case reviews of each Haitian child's situation, but nonetheless it refuses HRC any meaningful contact through which those services can be put to use. These restrictions drawn by the Government are not viewpoint neutral.

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[4] The Government's claim that it has provided "reasonable access" to HRC, Opp. at 20 n.12, distorts the facts of this case. The Government has only allowed HRC access to the Haitian refugees for short periods of time, and all interviews conducted by HRC were subject to heavy Government surveillance. Pet'n at 7-8.

For this reason, the panel's decision to allow the Government to flout the First Amendment is deserving of review.

Moreover, the Government continues to refuse even HRC's simple request for a list of the names of the Haitian children in detention. With such a list, HRC could conduct its own search for family members and could speed the process that the Government now purports to be carrying out on behalf of the Haitian children. As set forth in the Petition, this denial of the list of names violates the First Amendment. Pet'n at 28-29. As shown by the outside-the-record information in the Briefs of the Government and CABA, it also contradicts the Government's untenable claim to be acting the Haitian children's best interests.

Finally, the Government's Opposition Brief fails to refute the flaws in the panel's decision to deny the fundamental protections of the Due Process and Equal Protection Clauses to the Haitian children held under United States jurisdiction and control at Guantanamo. The distinctions that the Government attempted to make among the cases cited by Petitioner to support the applicability of fundamental constitutional protections for the Haitian children are ineffective.[5] Case law has consistently

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[5] For instance, the Government misstates the holding of *Jimenez v. The Tuna Vessel "Granada,"* 652 F.2d 415 (5th Cir. 1981), wherein the protections of the Constitution were recognized to encompass the Panama Canal Zone, where the United States exercised exclusive jurisdiction and control but not sovereignty. The Government claimed that that case involved only "treaties and provisions of domestic law." Opp. at 18 n.10. This interpretation is simply wrong: the court in *Jimenez* reversed the district court on constitutional grounds, finding that the "notice demands of procedural due process" were not met. *Jimenez*, 652 F.2d at 422. The Government further claims that the applicability of United States law in the Panama Canal Zone was "a matter of Executive discretion." Opp. at 18 n.10. This presumptuous statement conceives of the Executive as the final arbiter of the scope of the Constitution, instead of this Court, and it is unsurprising that the Government can offer no support for this proposition.

Similarly, the Government also seeks to escape the holding of *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). That case recognized that constitutional protections applied to the people of Micronesia, another area where, like in Guantanamo, the United States exercised exclusive jurisdiction and control but not sovereignty. *Id.* at 618-19. In its Opposition Brief, the Government argues that the *Ralpho* court extended constitutional protections to Microne-

recognized that the fundamental protections of the Constitution extend to areas where the United States exercises, as it does at Guantanamo, exclusive jurisdiction and control. Pet'n at 24-25. Those protections are particularly applicable to the Haitian children in this case, because, despite the Government's claim that there has been no "screening-in" done in this case, Opp. at 15-16, all of the Haitian refugees were screened when they were first detained by the Coast Guard, and only those who were approved were granted Safe Haven status at Guantanamo. Pet'n at 6.

Moreover, the Government has failed to distinguish adequately those cases where it has specifically been held that United States law applies to Guantanamo.[6] The Government's Brief contemplates a regime whereby it may pick and choose which laws and which portions of the Constitution it will apply

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sia not because that comported with established principles of fundamental constitutional jurisprudence, but because the Government had approved of that extension of rights in a letter to the United Nations. Opp. at 18 n.10. This argument is merely another attempt to vest the power of constitutional interpretation in the Executive instead of in this Court, and it should be rejected.

The third case cited in the Petition to demonstrate that the Constitution extends to areas under exclusive United States jurisdiction and control was *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979), which recognized that fundamental constitutional protections applied to the U.S.-occupied zone in Berlin. This case is not mentioned in the Opposition Brief, as apparently the Government has no answer to it.

[6] The Government argues that Petitioners' citation to *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975), which found U.S. criminal law to be applicable to a U.S. citizen on Guantanamo, is improper because that case "was premised on the erroneous view that the lease agreement between the United States and Cuba provides for general application of United States law on Guantanamo." Opp. at 14 n.8. No support is offered for this contention, unless the Government means to argue that a case's holding is "erroneous" merely because the Government disapproves of its result. In challenging Petitioners' reliance on cases such as *Rogers* and *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990), the Government is seeking to advance the premise that it has the right to select which portions of United States law will apply to Guantanamo, but this hubristic theory has apparently found no support.

The Government also challenges Petitioners' reliance upon *Huerta v. United States*, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977), as

in which areas, to which persons, and at which times. The Constitution and longstanding case law, however, hold otherwise. The panel's refusal to recognize the applicability of fundamental constitutional protections to the Haitian children warrants review by this Court.

CONCLUSION

For the foregoing reasons, and for all of the reasons set forth in the Petition, Petitioners request that the writ of certiorari be granted.

Respectfully submitted,

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support for the applicability of the Constitution to Guantanamo, on the grounds that the court in that case never reached the issue of the right of a Cuban national to bring a constitutional takings claim arising from conduct at Guantanamo. Opp. at 14 n.8. The Government, however, appeared to concede in that case that the takings claim was available to the Cuban plaintiff. The court therein enumerated the list of defenses that had been raised by the Government, and nowhere on that list did the Government dispute the applicability of the takings clause. *Huerta*, 548 F.2d at 344.

INDEX TO APPENDICES

		Page
A.	*Haitian Children Cry From Afar*, Miami Herald, May 23, 1995	1a
B.	*U.S. May Admit 202 Haitian Kids; For Others, Change May Be Too Late*, Miami Herald, May 17, 1995	3a

Appendix A

Haitian Children Cry From Afar,
Miami Herald, May 23, 1995

By Leslie Casimir

On a 13-inch television screen, Olgine Felisme's lips trembled as she made her plea to her mom Mimose Larose. Get her out of Haiti, she said.

The 16-year-old, detained for several months at the unaccompanied Haitian minors camp at the U.S. Navy base at Guantanamo Bay, Cuba, was repatriated in March.

Her father is dead. Her mom lives in Immokalee, but the girl was somehow sent back to Haiti to live with an aunt who can no longer care for her.

"I'm not going to school, I'm not doing anything here," cried Olgine, who buried her face in her hands. "I know you are working hard to get me out of here."

At a news conference on Monday, advocates for the Haitian children in Guantanamo showed abbreviated videotaped interviews with Olgine and five other children who were repatriated by the U.S. government from the naval base.

Last week, a team was sent to Haiti by Florida Rural Legal Services to interview about a dozen unaccompanied minors who were returned to Haiti.

Most of the kids, who fled Haiti in July, said their parents or relatives were killed by the Haitian military. They fled from the country on boats without a parent or guardian and were sent to the military base. Most claim to have family living in the United States.

Attorney Cheryl Little said government agencies in charge of finding the children's relatives have for the most part ignored the relatives who live in the States.

"We're doing irreparable harm to these children," Little said. "These children have been victimized first by the Haitian military and second by the U.S. government."

Last week, the Clinton administration announced that no unaccompanied Haitian child will remain on the base past June 30. On Monday morning, 19 Haitian children and one adult were repatriated, said Capt. Jim Gray, a base spokesman. So far, about 100 children have been returned to Haiti. And more than 20 have been brought to the United States. About 200 children remain at the base.

Gina Cunningham, who was part of the interviewing team, said the children appeared to be depressed and scared.

One child is homeless and lives under a porch. Another was taken up by a stranger who lives in squalid conditions. Another girl lives with a dead aunt's neighbor.

"None of the children have enough food to eat -- they're eating one meal a day," said Cunningham, co-owner of Haitian restaurant Tap Tap. "I feel ashamed that our government has made this serious mistake."

Eight relatives who have children at the base or in Haiti also spoke at the conference held at the Notre Dame D'Haiti Catholic Church, 110 NE 62nd St.

"I feel terrible," said Roselie Lori, whose child Roseline, 12, was featured on the video. Her child lives with strangers who have the same last name, Lori.

"I can't think straight anymore. I can't sleep because I want my child to be here with me," she said. "Why is this happening to my child?"

Appendix B

U.S. May Admit 202 Haitian Kids;
For Others, Change May Be Too Late,
Miami Herald, May 17, 1995

By Christopher Marquis and Joanne Cavanaugh

Under strong humanitarian pressure, the Clinton administration is preparing to allow entry to more than 200 Haitian children now held at the U.S. Naval Base at Guantanamo Bay, Cuba, top officials said Tuesday.

The administration must still get a final green light from the Justice Department and firm up offers of sponsorships for the children before Clinton approves the arrangement, one senior White House official said. An announcement is likely by the end of the week, the official said.

"There's an understanding that there's a real need to deal with (the Haitian kids) on a compassionate basis," the official said.

But the change in policy would come too late for 26 children who along with eight adults Tuesday boarded a military cargo plane at the naval base bound for Haiti.

U.S. refugee workers were oblivious to the preparations in Washington. Some of the children expressed fear about what lay ahead as camp officials primed them for the journey. Although caseworkers insisted the children would be returned to family, some boys and girls said they have no relatives in Haiti. They worried they would wind up sleeping in the streets.

"My family died a long time ago. I don't know where they came up with the father they gave me," said a 17-year-old boy. "I don't know where I will stay."

There are now 410 Haitians, including 202 children, detained at Guantanamo. The children have been held while international relief groups and the U.S. government seek to place them with relatives in Haiti or the United States, officials said. The children, refugees interdicted at sea by the U.S. Coast Guard, have

largely resisted U.S. plans to return them to Haiti, saying they would be safer or better cared for by relatives in the United States.

The administration, which last year deployed troops to Haiti and returned the country's democratically elected president to power, has argued that most of the children should be returned to the closest relatives capable of caring for them, whether they reside in their homeland or in the United States. The administration is still operating under that plan, which calls for relocating all of the children in either location within six weeks.

The plight of the unaccompanied children has sparked an outcry from some Haitian refugee advocates, who contrast the children's continued detention in dreary camps with the administration's May 2 decision to admit most of 21,000 Cuban refugees also being held at Guantanamo.

Last week, Florida Rural Legal Services in Miami released a report that contends that some youths sent back to Haiti are living with strangers or have no homes, yet have family in the United States. The UN and the State Department are reviewing the report.

"We admit there have been problems," said Barbara Francis, a UN spokeswoman. "But we don't send kids back to the streets. We send them to their parents or a primary caregiver."

So far, international relief groups have overseen the transfer of 85 Haitian children back to Haiti, including the 26 returned Tuesday. Twenty-three children have been allowed to join relatives in the United States.

The administration hopes to firm up offers of sponsorships for the children before Clinton approves the arrangement, the White House official said.

"We will do what's in the best interest of the children," he said. At the camp Monday, workers also tried to assure the children returning to Haiti that the trip was in their best interest.

Sitting in folding metal chairs, children clutched composition books on their lap. Most were rousted from school an hour

before. Several scraped their feet on the linoleum and looked down as they heard the news many had expected.

A few raised their hands, asking questions over the hum of the window air conditioner: "Who found my family?" one incredulous youth asked. "I want whoever found my family to take me to them."

U.S. Army Col. Willie McMillian tried to ease the tension. He told them that a Westport, Conn.-based humanitarian group, Save the Children, had found their parents or close relatives.

The same group would meet them at the dock in Port-au-Prince, take them to their homes and follow-up with visits about a month later. The children were given little yellow Bibles.

On Tuesday, a charter plane of 173 Cubans left Guantanamo bound for South Florida. A half hour later, the 26 Haitian children and 8 adults boarded a military cargo plane headed for Haiti.